**SHIREEN CHELLIAH THIRUCHELVAM** A

**v.**

**KANAGASINGAM KANDIAH**

HIGH COURT MALAYA, KUALA LUMPUR B
SURAYA OTHMAN J
[ORIGINATING SUMMONS NO: S8-24-129-2008]
18 SEPTEMBER 2009

***FAMILY LAW:*** *Children - Custody - Factors taken into account - Removal from jurisdiction - Orders the court can make - Law Reform (Marriage and Divorce) Act 1976, s. 88* C

***FAMILY LAW:*** *Maintenance - Wife - Whether interim maintenance could be ordered where adultery is alleged - Conduct of parties - Law Reform (Marriage and Divorce) Act 1976, s. 78* D

***FAMILY LAW:*** *Children - Maintenance - Whose primary responsibility to maintain children - Whether children to be maintained at same standard of living as during the existence of the marriage - Law Reform (Marriage and Divorce) Act 1976, s. 92* E

***FAMILY LAW:*** *Family violence - Orders for protection - Whether could be applied for prior to commencement of divorce proceedings - Law Reform (Marriage and Divorce) Act 1976, s. 103*

F

The plaintiff and the defendant were married on 31 August 1994 and had four children. Due to a breakdown of the marriage, on 11 August 2008, the plaintiff left the matrimonial home with the children who were aged between 9 and 14 years. The following month, the eldest child, a daughter, left her mother and returned to the matrimonial home. G

The plaintiff sought orders pertaining to the custody, care and control of the four children and also *interim* monthly maintenance of RM15,500 for herself and the children.

H

The plaintiff alleged domestic violence on the part of the defendant, citing an *interim* protection order ('IPO') dated 11 November 2008 from the Kuala Lumpur Magistrate Court, whereas the defendant alleged that the plaintiff was in an adulterous relationship with the man she went to live with when she left the matrimonial home. I

The defendant's counsel submitted that s. 82 of the Law Reform (Marriage and Divorce) Act 1976 ('LRA') clearly indicates that a right of any divorced person to receive maintenance from his or her former spouse under any order of court shall cease on his or her marriage to, or living in adultery with, any other person.

**Held (allowing some of the plaintiff's claims and ordering costs in the cause):**

**(1)** Section 88(2) of the LRA states that, in making orders for custody, the court must consider the child's welfare, together with the parents' and child's wishes. The eldest child's preference to live with her father was manifested when she left her mother to live with her father in the matrimonial home. On the other hand, the other children remained with their mother therefore implying their preference to stay with their mother. Apart from the children's preference, it was undesirable for the court to disturb the children's life by changes of custody as it could create a negative effect on them. The issue of adultery had not yet been established and would not be considered in deciding *interim* custody. As such, custody, care and control of the three children in the plaintiff's care were granted to the plaintiff, while that of eldest child was given to the defendant. (paras 16, 17, 18 & 19)

**(2)** Section 78 of the LRA requires the court to assess the means and the needs of both parties and their respective conducts contributing to the irretrievable breakdown of the marriage when deciding the issue of maintenance and the amount to be awarded. Therefore, until the divorce petition is filed and a determination made as to whether the alleged adulterous relationship led to the breakdown, the issue of apportionment of responsibility could not be decided upon by the court and the issue of maintenance for the plaintiff must be postponed until then. *Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo* (not foll). (para 25)

**(3)** The husband has the primary obligation to maintain the children whereas the mother has only a secondary obligation where the court 'is satisfied that having regard to her means it is reasonable to do so'. The word 'maintenance' in s. 92 of the LRA should be interpreted broadly and signifies any form of material provision enabling the children to enjoy the same standard of living as they did during the existence of the marriage, having regard to the means and needs of the parties.

Although RM15,500 per month was within the defendant's means taking into account the parties' wealthy background and assets, the plaintiff had failed to prove the standard of living that the children had been accustomed to during the marriage and had not substantiated her claim. Therefore, a monthly maintenance of RM2,000 for each child in the plaintiff's custody was appropriate, being within the means of the defendant and would meet the needs of the three children, payable from July 2009. *Borthwick (Deceased), Borthwick v. Beauvais, Re* (foll); *Sivajothi K Suppiah v. Kunathasan a/l Chelliah* (foll). (paras 33, 35, 36 & 37)

**(4)** Even though matrimonial proceedings had not yet been presented, the court applied a liberal interpretation to s. 103 of the LRA to grant the injunction against molestation taking into account the plaintiff had obtained the IPO. This was sufficient for the court to use its discretion to ensure the safety of the plaintiff and the children, to allow the court to make orders in terms of prayers (d)-(h). *Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo* (foll). (paras 41 & 42)

**(5)** As the defendant had obtained an order restraining the plaintiff wife from removing the children out of the jurisdiction of the High Court by originating summons No. S8-24-6-2009, hence, it was justifiable for the court to make an additional order to restrain the defendant from removing the three children from the plaintiff's custody. (para 44)

*[Order accordingly.]*

**Case(s) referred to:**

*B Ravandran Balan v. Maliga Mani Pillai [1995] 1 LNS 21 HC* ***(refd)***

*Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo [2002] 1 CLJ 721 CA* ***(refd)***

*Lee Yu Lan v. Lim Thain Chye [1983] 1 LNS 41 HC* ***(refd)***

*Mahabir Prasad v. Pushpa Mahabir Prasad [1981] CLJ 124; [1981] CLJ (Rep) 65* ***(refd)***

*Re Borthwick (Deceased), Borthwick v. Beauvais [1949] Ch 395* ***(refd)***

*Sivajothi K Suppiah v. Kunathasan Chelliah [2000] 3 CLJ 175 HC* ***(foll)***

*V Sandrasagaran Veerapan Raman v. Dettarassar Velentine Souvina Marie [1999] 5 CLJ 474 HC* ***(refd)***

*Yap Kim Swee v. Leong Hung Yin [1986] 1 LNS 127 HC* ***(refd)***

*Yong May Inn v. Sia Kuen Seng [1970] 1 LNS 176 HC* ***(refd)***

**Legislation referred to:**
Law Reform (Marriage and Divorce) Act 1976, ss. 58, 77(1), 78, 82, 88(2), 92, 93, 103

*For the plaintiff - Aziatulazwa Abdul Wahab; M/s Wong, Ina & Assoc*
*For the defendant - Vasanthi Clemant (Jamilah with her); M/s Suzana, Lee & Siti*

*Reported by Anne Khoo*

## JUDGMENT

**Suraya Othman J:**

**Introduction**

**[1]** This is an application by the plaintiff/wife by way of originating summons in encl. (1) praying for the following orders:

(a) that the plaintiff be given *interim* custody, care and control of the four children of the marriage who are; Danisha a/p Kanagasingam, Lohesh a/l Kanagasingam, Surekha a/p Kanagasingam and Lohanesh a/l Kanagasingam;

(b) that the defendant/husband return the child of the marriage named Vanesh a/l Kanagasingam to the plaintiff on the date of this order;

(c) that the defendant pay an *interim* maintenance of RM15,500 per month to the plaintiff and the children from August 2008 until disposal of the divorce petition or until further orders;

(d) that the defendant whether by himself, servant or agent be restrained from damaging or destroying the plaintiff's property and matrimonial property for the purpose of causing harm to the plaintiff and the children;

(e) that the defendant whether by himself, servant or agent be restrained from beating, threatening, disturbing or/and by any means using physical or mental violence to force the plaintiff and the children to accept his presence;

(f) that the defendant whether by himself, servant or agent be restrained from putting or attempt to put any fear of physical injury with or without intention against the plaintiff and the children;

(g) that the defendant whether by himself, servant or agent be restrained from causing physical injury to the plaintiff and the children in any manner whatsoever;

(h) that the defendant whether by himself, servant or agent be restrained from entering or loitering at the plaintiff's work place, her home or any place in which the plaintiff and the children are located until further orders;

(i) that the defendant whether by himself, servant or agent be restrained from taking possession, control and care of the children from any place whatsoever;

(j) that the defendant whether by himself, servant or agent be restrained from removing the children out of the jurisdiction of the High Court of Malaya;

(k) that the defendant is at liberty to apply for any variation of these orders and such application shall be heard *inter partes* by this Honourable Court;

(l) costs in the cause; and

(m) other further reliefs the court thinks fit.

**Facts And Background**

**[2]** Before going any further, it is important to set out the factual background and the sequence of events relevant to this application. The plaintiff in this case was married to the defendant on 31 August 1994 and out of this marriage four children were born ("said children"); two girls and two boys.

**[3]** They are Danisha Kanagasingam (14 years old girl), Lohanesh Kanagasingam (11 years old boy), Surekha Kanagasingam (10 years old girl) and Venesh Kanagasingam (9 years old boy).

**[4]** The plaintiff and the defendant encountered problems in their marriage, after which the plaintiff left their matrimonial home at No. 17, Jalan Telawi 9, Bangsar, Kuala Lumpur with the said children on 11 August 2008. In the middle of September 2008 the eldest daughter, Danisha left her mother and returned to the matrimonial home.

**[5]** The plaintiff then filed an *ex parte* originating summon on 3 November 2008 but was instructed by this court on 21 November 2008 to effect service of the originating summon to the defendant as the court is of the opinion that this application should be heard *inter partes*.

## Judgment Of The Court

*Guardianship: Prayer (a)*

**[6]** In seeking the right of custody, care and control of the said children, plaintiff contended that:

(a) she had left the matrimonial home on 11 August 2008 with the knowledge of and agreed to by the defendant;

(b) she and defendant were agreeable that all the four children will be under her care;

(c) apart from bringing the children for dinner with the defendant every weekend, sometimes she and her maid will return to the matrimonial home for the purpose of cleaning up the home;

(d) sometimes in the middle of September 2008, the eldest daughter Danisha decided to leave her mother and stay with her father, the defendant at the matrimonial home;

(e) the arrangement of the said dinner continued until an incident which took place on 28 September 2008. On the said date, the defendant was angry with Lohanesh and pushed him to a wall. When she tried to intervene, the defendant pushed her. After this incident Lohanesh, Surekha and Vanesh refused to meet with the defendant;

(f) Plaintiff further states that the defendant is a hot tempered person who is uncontrollable when angry. She and the four children were beaten by the defendant. She obtained an Interim Protection Order ("IPO") in consequence of her Police Report dated 8 Jun 2009; and

(g) Plaintiff also contended that the defendant is an irresponsible father who do not take care of their children's welfare and needs.

**[7]** Plaintiff's counsel submitted the case of *Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo* [2002] 1 CLJ 721 CA, which stated:

> Faced with such conflicting affidavit evidence, what the trial judge should have done was to sieve through such evidence, consider only those that are undisputed or uncontroverted and balance these with the consideration of what would work towards the betterment and interests of the four children.

**[8]** Counsel for the plaintiff further submitted the case of *Mahabir Prasad v. Pushpa Mahabir Prasad* [1981] CLJ 124; [1981] CLJ (Rep) 65 where Raja Azlan Shah CJ (as he then was) held:

> The mere desire of a parent to have his children must be subordinate to the consideration of the welfare of the children, and can be effective only if it coincides with their welfare.

**[9]** Counsel for the plaintiff then referred to the case of *Yong May Inn v. Sia Kuen Seng* [1970] 1 LNS 176 HC. In this case the court held:

> The children have a right to their mother's love and affection and no one can do what a mother can do for the children.

**[10]** Plaintiff's counsel further submitted the principal that was laid down in the case of *Sivajothi K Suppiah v. Kunathasan Chelliah* [2000] 3 CLJ 175 HC:

> The overriding factors include the following:
>
> (a) The children being three young girls of tender age required the personal and intimate care of the mother as they grow up;
>
> (b) Matters relating to puberty, problems relating to menstruation, physical, physiological and emotional changes can best be attended by the mother and not by the father;
>
> (c) The mother's touch and physical proximity.

**[11]** In replying to the plaintiff's submission, the defendant contended that:

(a) Plaintiff left the house with the children without his knowledge;

(b) Plaintiff left the matrimonial home because she wanted to live with another man named Dr Suresh Marcandan, an Australian citizen, and this illicit relationship caused enormous strain to the marriage. The defendant had made a police report alleging that plaintiff stole furniture from the matrimonial home and stored them in Dr Suresh Marcandan's house in Bangsar Puteri. Police later went to Dr Suresh Marcandan's house and found the said furniture but refused to take any action, regarding it as a domestic dispute;

(c) Plaintiff resides at Dr Suresh Marcandan's home, drives his car and work in Dr Suresh Marcandan friend's company;

(d) the eldest daughter, Danisha refused to stay with her mother (plaintiff) since she disapproves of the adulterous relationship between her mother and Dr Suresh Marcandan; and

(e) the issue of maintenance and custody should be postponed and decided only at the hearing of the petition for divorce since the assessment for maintenance will depend on the degree of responsibility of each party to the breakdown of the marriage and in this case, the defendant alleges that it was the adulterous relationship between plaintiff and Dr Suresh Marcandan that led to the breakdown of the marriage.

**[12]** Defendant referred to the case of *Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo (supra)* and submitted that it is not proper to give the right of custody, care and control of the four children to plaintiff while plaintiff live in continuous adulterous relationship with the said Dr Suresh Marcandan as it will have a negative effect on the said children.

**[13]** Defendant further submitted that there is no evidence to suggest that he is a hot tempered person and had acted violently towards the plaintiff and the said children.

## Finding Of The Court

**[14]** The law applicable under prayer (a) is found in s. 88 of the Law Reform (Marriage and Divorce) Act 1976 ("LRA"). Section 88 states:

> 88. Power for court to make order for custody.
>
> (1) The court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that

the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person.

(2) In deciding in whose custody a child should be placed the paramount consideration shall be the welfare of the child and subject to this the court shall have regard:

(a) to the wishes of the parents of the child; and

(b) to the wishes of the child, where he or she is of an age to express an independent opinion.

(3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

(4) Where there are two or more children of a marriage, the court shall not be bound to place both or all in the custody of the same person but shall consider the welfare of each independently.

**[15]** The salient point to note here is that it is an undeniable fact that since 11 August 2008 the plaintiff had under her custody the said four children until the eldest daughter, Danisha left her mother on September 2008 to stay with her father (defendant) at the matrimonial home. The other three children Lohanesh, Surekha and Vanesh remained under the plaintiff's custody.

**[16]** In the circumstances, in considering the issue of custody of the said three children ie, Lohanesh, Surekha and Vanesh, the paramount consideration should be the welfare of the children. According to s. 88(2) of the Act, the court apart from considering the welfare of the child, must consider the wishes of the parents and wishes of the child as well. After perusing the affidavits filed herein, it can be concluded that the eldest daughter preferred to stay with her father, the defendant. This preference is manifested when she left her mother on September 2008 to live with her father in the matrimonial home. On the other hand, the second, third and fourth children remained with their mother therefore implying their preference to stay with their mother, the plaintiff.

**[17]** Apart from taking into consideration, the wishes of the children, the *status quo* should remain as it is undesirable for this court to disturb the life of the children by changes of custody just

because of matrimonial problems faced by their parents. Removing the three children from their present environment with their mother may create a negative effect on them. On this point, it is important to highlight the decision by Haidar Mohd Noor J (as he then was) in the case of *B Ravandran Balan v. Maliga Mani Pillai* [1995] 1 LNS 21 HC which states:

> The four children have been living with the respondent all these years and I do not think it is appropriate that their togetherness should be disturbed because of the matrimonial problems of their parents. They are still very young.

**[18]** Defendant's counsel then contended that if plaintiff were given custody of the children, it will have a negative effect as defendant had accused the plaintiff of living in a continuous adulterous relationship with one named Dr Suresh Marcandan. Defendant's counsel further submitted that the issue of adultery will be proven subsequently in the divorce petition. This court feels that since the issue of adultery has not been established at this stage, it will not be considered by this court in deciding who gets *interim* custody.

**[19]** As such, taking into consideration the wishes of the children and the undesirability of disturbing their life by changes of custody, the *status quo* is maintained and this court orders that custody care and control of Lohanesh, Surekha and Venesh be given to the plaintiff/mother while that of Danisha be given to the defendant/father.

*Agreed prayer: Prayer (b)*

**[20]** The defendant has no objection to prayer (b) since the child Venesh Kanagasingam was already under the plaintiff's custody since 21 November 2008. As such the prayer has now become academic.

*Maintenance: Prayer (c)*

**[21]** Plaintiff's counsel submitted that the defendant's monthly salary is RM47,500 per month, excluding monthly rental received by defendant for one unit two storey terrace house in Puchong which is in the name of the plaintiff. Since plaintiff left the matrimonial home with the said children, the defendant had never paid any maintenance to the plaintiff and the children.

**[22]** Counsel for plaintiff submitted the case of *Sivajothi K Suppiah v. Kunathasan Chelliah (supra)* which stated that: A

> Maintenance signifies any form of material provision that will enable an adult to live a normal life and a child to be brought up properly. Thus maintenance cannot mean only mere subsistence, ie, the food she puts in her month bur also means the clothes on her back, the house in which she lives and the money which she has to have in her pocket, all of which vary according to the means of the man who leaves his wife behind. B

**[23]** Plaintiff's counsel further referred to the case of *Diana Clarice Chan Chiing Hwa v. Tiong Chiong Hoo (supra)* where the Court of Appeal stated: C

> However, bearing in mind the generous lifestyle that she was used to, we consider that a monthly sum of RM25,000 for her and Stefany would be sufficient to maintain both of them." D

**[24]** Another case referred to by plaintiff's counsel was the case of *V Sandrasagaran Veerapan Raman v. Dettarassar Velentine Souvina Marie* [1999] 5 CLJ 474 HC. In this case the court explained that: E

> In assessing the means and needs of the parties the court should have regard to the duration of marriage, whether there were any children to the marriage, the age of the parties, whether the petitioner had financially supported the respondent during the duration of the marriage, the parties earning capabilities and whether the divorce would/has affected her position financially. F

**[25]** Defendant's counsel on the other hand submitted that s. 78 of the LRA states that in determining the amount of any maintenance to be paid, the court shall base its assessment primarily on the means and need of the parties, regardless of the proportion such maintenance bears to the income of the husband or the wife as the case maybe, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage. Therefore the assessment of maintenance should be accessed based on the fact or evidence indicating which party causes the breakdown of the marriage. In this case counsel for the defendant submitted that the court should not give any order of maintenance on the basis that the issue of adultery as alleged has to be decided first. As such the order for maintenance should be postponed until of the disposal of the divorce petition. G H I

**[26]** Defendant's counsel also submitted that s. 82 of LRA clearly indicates that a right of any divorced person to receive maintenance from his or her former spouse under any order of court shall cease on his or her marriage to, or living in adultery with any other person. In this matter the defendant's counsel submitted there are various allegations by several parties with regards to plaintiff's adulterous relationship with Dr Suresh Marcandan.

## Finding Of The Court

*Maintenance Of Wife*

**[27]** In prayers (c) of the Originating Summon, the plaintiff seeks an *interim* monthly maintenance of RM15,500 per month for herself and the four children. The law under s. 77(1) of the LRA empowers this court to order maintenance payment against the husband for the benefit of the wife. This court in assessing whether a wife is entitled to such a payment is guided by the wordings in s. 78 LRA. Both ss. 77 and 78 of the LRA provide:

> Section 77 Power for court to order maintenance of spouse
>
> (1) The Court may order a man to pay maintenance to his wife or former wife:
>
> (a) during the course of any matrimonial proceedings;
>
> (b) when granting or subsequent to the grant of a decree of divorce or judicial separation;
>
> (c) if, after a decree declaring her presumed to be dead, she is found to be alive.
>
> (2) The court shall have the corresponding power to order a woman to pay maintenance to her husband or former husband where he is incapacitated, wholly or partially, from earning a livelihood by reason of mental or physical injury or ill-health, and the court is satisfied that having regard to her means it is reasonable so to order.
>
> Section 78 Assessment of Maintenance
>
> In determining the amount of maintenance to be paid by a man to his wife or former wife or by a woman to her husband or former husband, the court shall base its assessment primarily on the means and needs of the parties, regardless of the proportion such maintenance bears to the income of the husband or wife as

> the case may be, but shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage. (emphasis added)

**[28]** It may be summed up that s. 78 of the LRA requires this court to assess the means and the needs of both the plaintiff and the defendant and also their respective conducts which contributed to the irretrievable breakdown of the marriage in coming to a decision whether the plaintiff is entitled to any maintenance at all and if so, the amount to be awarded. Before this court can asses the means of the parties, the question that calls for determination here is whether it is empowered to grant maintenance to the for wife at this stage of proceeding when no matrimonial proceeding has been presented before this court. In this regard, the Court of Appeal in the case of *Diana Clarice Chan Ching Hwa (supra)* held that:

> ... as the 1976 Act is a social legislation for which a liberal interpretation is more apt than a strict one, and so matrimonial proceeding need not necessarily commence with the filing of a petition for divorce etc, as any step taken by a party under the 1976 Act such as the application for reconciliation as a prelude to bringing the marriage to an end is sufficient to put s. 77(1)(a) into motion.

**[29]** Although the aforesaid authority stated that there would be no necessity for the parties to wait until the commencement of a divorce petition before making an application for maintenance for the wife, this court is of the opinion that maintenance for the wife should not be allowed at this stage as s. 78 clearly states that in determining the amount of maintenance to be paid by a man to his wife the court shall have regard to the degree of responsibility which the court apportions to each party for the breakdown of the marriage. In the case of *Lee Yu Lan v. Lim Thain Chye* [1983] 1 LNS 41 HC, the court took into account the responsibility on the part of respondent husband for the breakdown of the marriage before arriving at an appropriate sum of maintenance for the wife. Another enlightening authority is in the local case of *Yap Kim Swee v. Leong Hung Yin* [1986] 1 LNS 127 HC, where the husband was granted a *decree nisi* on the sole ground of the wife's adultery. In that case, the wife failed to seek relief for maintenance because of her adultery, which caused the breakdown of marriage. The court applied s. 78 of the LRA and the degree of responsibility of

the wife which led to the breakdown of marriage in the assessment of maintenance. Siti Norma Yaakob J (as she then was) stated:

> **When considering her claim for maintenance, regard must be had to the degree of responsibility that led to the breakdown of this marriage**. In answer to the respondent's allegation of adultery, the applicant had also filed an answer and cross-petition alleging adultery on the part of the respondent with a woman named. However, the application never proceeded on this allegation as she withdrew her answer and cross-petition *on the date of the trial and consented to the defendant being granted a decree nisi on the sole ground of her adultery with the co-respondent who was also condemned to pay damages to the respondent. In view of this unqualified admission of adultery and from the pleadings that appears to be the only ground for the breakdown of the marriage and since the applicant had been the guilty party, I rule that she is not entitled to any maintenance whatsoever.* (emphasis added)

**[30]** Therefore before this court can decide whether the wife is entitled to any maintenance, the issue of whether the alleged adulterous relationship between the wife and Dr Suresh Marcandan led to the breakdown of the marriage has to be decided first. The defendant has to file a petition for divorce and cite the alleged adulterer as a co respondent or if the wife filed for divorce, then the defendant has to cite the alleged adulterer in his answer to the divorce petition as required by s. 58 of the LRA. Until the divorce petition is filed and the allegation of adultery is ventilated the issue of apportionment of responsibility for the breakdown of the marriage cannot be decided upon by this court and as such the issue of maintenance to the wife too, had to be postponed till that date.

*Maintenance Of Children Of Marriage*

**[31]** Having dispose of the issue pertaining to maintenance for the wife, this court shall now consider the issue of maintenance for the children. The assessment of the maintenance payable with respect to the children is provided for by s. 92 of the LRA which states that:

> 92. Duty to maintain children.
>
> ... it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or in the custody of any other person, either by providing them with such accommodation,

clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the costs thereof.

**[32]** Section 93 of the LRA further provides that:

93. Power for court to order maintenance for children.

(1) The court may at any time order a man to pay maintenance for the benefit of his child:

(a) If he has refused or neglected reasonably to provide for the child;

(b) If he has deserted his wife and the child is in her charge;

(c) During the pendency of any matrimonial proceedings; or

(d) When making or subsequent to the making of an order placing the child in the custody of any other person.

(2) The court shall have the corresponding power to order a woman to pay or contribute towards the maintenance of her child where it is satisfied that having regard to her means it is reasonable so to order.

(3) An order under subsection (1) or (2) may direct payment to the person having custody or care and control of the child or trustees for the child.

**[33]** Therefore it is clear that the husband has the primary obligation to maintain the children. The mother has only a secondary obligation to pay or contribute towards the maintenance of her children where the court "is satisfied that having regard to her means it is reasonable to do so.

**[34]** In this instant case, the plaintiff affirmed in her affidavit that she prays for an *interim* monthly maintenance of RM15,500 for herself and the children. It is observed that prior to the breakdown of the marriage, while parties were still living together as a family, the plaintiff wife received an income of RM7,000 as marketing and sales manager's remuneration from the company, Anshidas Company Sdn Bhd, where she was then a shareholder. However, sometime in August 2008, the plaintiff alleged that the defendant/husband forced her under duress to resign as a director of Anshidas Company Sdn Bhd thus depriving her of a monthly income of RM7,000 which she received as director's fees (see exh. SCT5, affidavit in support of the originating summon

(encl. 2)). Subsequently when the plaintiff wife moved out of the matrimonial home on 11 August 2008, the defendant husband stopped paying any maintenance altogether.

**[35]** The word 'maintenance' as used in s. 92 of the LRA should be interpreted broadly. It signifies any form of material provision that will enable the children to be placed in a position to enjoy the same standard of living as they did during the existence of the marriage. In the case of *Re Borthwick (Deceased), Borthwick v. Beauvais* [1949] Ch 395 at p. 401, Harman J held:

> It is said that maintenance is the only thing you can look at. What does that mean? It does not mean that you can only give the dependent just enough to put a little jam on his bread and butter. It has been already held that what is reasonable for one may not be reasonable for another. It must depend on the circumstances of the case. It certainly depends to some extent on the circumstances of the widow, but I think it may also depend on the circumstances of the testator, that is to say, whether he died a rich man or no, because a rich man may be supposed to have made better provision for his wife's maintenance than a poor one. Maintenance does not only mean the food she puts in her mouth it means the clothes on her back, the house in which she live, and the money which she has in her pocket, all of which vary according to the means of the man who leaves a wife behind him. I think that must be so. Maintenance cannot mean only a mere subsistence.

**[36]** This court is of the opinion that it must consider the means and needs of the parties involved before deciding the appropriate maintenance to be given to the children. In the case of *Sivajothi K Suppiah v. Kunathasan Chelliah (supra)*, the court held as follows:

> Maintenance signify any form of material provision that will enable an adult to live a normal life and a child to be brought up properly. Thus maintenance cannot mean only mere subsistence, ie, the food she puts in her mouth but also means the clothes on her back, the house in which she lives and the money which she has to have in her pocket, all of which vary according to the means of the man who leaves a wife behind. Moreover, it is settled law that it is the duty of the father to maintain the standard of living the children had enjoyed in the past, ie, during the existence of the marriage.

**[37]** To determine the needs of the children, the court ought to take into account the standard of living that the children had been accustomed to during the existence of the marriage. Taking into account the fact that the parties before this court are from

wealthy upper middle class family with considerable assets, this court has to consider the means and needs of the parties in the light of the fact that the defendant husband is a businessman who runs his own business. Having said that, the plaintiff wife's claim for RM15,500 as maintenance for herself and the children is not substantiated. Even though the sum prayed for seems to be within the means of the defendant husband, the plaintiff wife had failed to prove before this court the details of the standard of living that the children had been accustomed to during the existence of the marriage.

**[38]** Therefore having regard to the scant evidence available before this court, it is of the view that a monthly maintenance of RM2,000 for each child of the marriage respectively, ie, Lohanesh, Surekha and Venesh, would be within the means of the husband and would meet the needs of the said three children. The total sum would be RM6,000 to be paid effective from July 2009 and thereafter before the 7th of each month.

*Injunction Against Molestation: Prayer (d), (e), (f) (g) And (h)*

**[39]** The defendant husband objected to the plaintiff wife's prayer for injunction against molestation on the ground that there was no police report lodged by the plaintiff wife or any medical reports pertaining to any injuries suffered by her or any of their children as a result of any alleged domestic violence perpetuated by him.

**[40]** This is not correct since it was disclosed by the plaintiff wife that she had obtained an Interim Protection Order ("IPO") dated 11 November 2008 from the Kuala Lumpur Magistrate Court as a consequence of a police report lodged by her complaining of domestic violence by the defendant husband against their children on 8 June 2008.

*Finding Of The Court*

**[41]** The relevant section pertaining to the application of injunction against molestation is provided for by s. 103 of the LRA which states that:

> The court shall have power during the pendency of any matrimonial proceeding or when granting or subsequent to the grant of a decree of divorce or judicial separation, to order any person to refrain from forcing his or her society on his or her spouse and from other acts of molestation.

**[42]** From the said section, using a literal interpretation it can be noted that this court is only empowered to grant an injunction against molestation at the stage when matrimonial proceedings had been presented by a spouse. However by using the liberal approach as laid down by the court of appeal in the case of *Diana Clarie Chan Ching Hwa (supra)*, this court has applied the said principal, *mutatis mutandis*, to an application for an injunction against molestation under s. 103, by applying the liberal interpretation in preference to a literal interpretation.

**[43]** The fact that the Plaintiff wife had obtained an IPO dated 11 November 2008 from the Kuala Lumpur magistrate court as a consequence of a police report lodged by her complaining of domestic violence against her and the children is sufficient for this court to use its discretion to ensure the safety of the plaintiff and the children. There can be no doubt that there were complaints in the form of a police report and also an IPO against the defendant. This court therefore makes an order in terms of prayers (d), (e), (f), (g), and (h).

*Removal Of Children: Prayer (i) And (j)*

**[44]** The defendant husband had obtained an order restraining the plaintiff wife and Dr Suresh Marcandan from removing the children out of the jurisdiction of the High Court by originating summons No. S8-24-6-2009. Hence, it is justifiable for this court to make an additional order to restrain the husband from removing the said three children from the wife's custody. Therefore this court makes an order in terms of prayers (i) and (j) of the originating summons.

*Costs*

**[45]** On the factual background and circumstances of this case, this court order costs in the cause.

**[46]** Order accordingly.